85-423

No.

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CARL WESLEY THOMAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. In order to establish a right to severance of his trial from that of his co-defendants based on the willingness of one of his co-defendants to testify at a severed trial, must a defendant show that the testimony would not be subject to "substantial impeachment"?

2. At what point is a district court required to determine the admissibility of hearsay statements of co-conspirators?

3. What is the obligation, if any, of a distict court when presented with uncontroverted evidence that a defendant in a conspiracy trial cannot testify for fear of his life, where procedures, such as severance, are available that would minimize the danger?

4. Assuming that the denial of each of several defense motions is not in itself an abuse of discretion, is there a point at which the cumulative effect of the denials in the face of grants of analogous prosecution motions offends due process?

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CARL WESLEY THOMAS,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ORDERS BELOW

Petitioner seeks review of the judgment of the Court of Appeals for the Eighth Circuit denying petitioner's appeal from a final judgment of conviction entered in the District Court for the Western District of Missouri. A copy of the opinion of the Court of Appeals is

attached hereto as Appendix A.

Petitioner further seeks review of the order of the Court of Appeals denying his petition for rehearing and rehearing en banc. A copy of that order appears in Appendix B hereto.

JURISDICTION

The order of the Court of Appeals denying rehearing was filed on July 12, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence, Rule 801(d)(2)(E)

> "A statement is not hearsay if --
>
> (2) The statement is offered against a party and is . . .
>
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

On November 5, 1981, petitioner and ten others were charged in a seventeen-count indictment with: (1) knowingly transporting stolen money in interstate commerce, (2) travelling in and utilizing the facilities of interestate commerce with the intention of establishing and managing an unlawful interest in a Nevada gaming establishment, and (3) conspiring with others to accomplish these ends -- all in violation of 18 U.S.C. §§ 2, 371, 1952, and 2314 (1982).

During the period covered by the indictment, the state of Nevada required that persons owning, managing, operating, or receiving profits from casinos be licensed in accordance with state law and regulations. Certain employees with less direct influence over gaming operations were required to obtain work permits. Persons who had felony records or poor

reputations, or had been known to associate with such persons were unlikely to be licensed. Petitioner was licensed with repsect to his own two casinos. Defendants Shepard and Caldwell were licensed with respect to the Tropicana casino in Las Vegas. None of the other defendants were licensed or had been issued a work permit.

The case preceded to trial on May 31, 1983 against petitioner and co-defendants Carl Civella, Carl DeLuna, Peter Tamburello, Charles Moretina, and Anthony Chiavola. Prior to that date, Nick Civella, the conceded "kingpin", died; defendants Donald Shepard and Billy Caldwell pleaded guilty to various counts of the indictment; and defendant Joseph Agosto pleaded guilty to two counts in exchange for his cooperation as a witness at trial against the remaining defendants. Defendant Carl Caruso entered a guilty plea shortly after the commencement of

trial.

The government sought to prove that the defendants had conspired to gain control over the Tropicana casino in order to "skim" money from the casino by removing cash before it was counted or reported and to transport the skimmed money in interstate commerce. (Slip opn., A-4.) The prosecution evidence consisted primarily of the testimony of co-conspirator Joseph Agosto, supported and interlaced with more than 106 tape-recorded conversations,[1] and "corroborated" by notes written by co-defendants DeLuna and Tamburello. (Slip opn., A-5.)

The government's theory of the case was that Agosto and the Civellas deter-

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[1] The tapes introduced at trial comprised only a small percentage of the more than 2,000 reels of tapes collected over a two-year period pursuant to 29 distinct surveillance applications. It was estimated that the tapes included some 1,300 hours of recorded conversations. (Affidavit of Special Agent Eugene N. Thomeczek, filed June 16, 1982, at pp. 1, 4: RT Vol. II at p. 221.)

mined to obtain control of the Tropicana. Because neither Agosto, a convicted felon, nor the Civellas, who were listed in the "Black Book" of people to be excluded from Nevada Casinos, could legitimately be involved with the Tropicana, they used such subterfuges as code names to disguise their true identities. (Slip opn., A-5.) They involved DeLuna as a principal assistant, employed Shepard and Caldwell -- who were licensable -- as managers, and consulted petitioner for accounting advice on the operation and potential profitability of the Tropicana. Furthermore, the government was able to prove to the satisfaction of the jury that petitioner knowingly assisted the skimming operation.

In contrast, petitioner sought to establish that, although he had knowledge that co-defendants may have engaged in unlawful activity, he did not join them; and that, although he offered advice to

them upon request, he did so out of fear, and not out of any interest in personal gain. It is clear from the record that the trial court believed that petitioner did not derive any profit from the scheme. (RT Vol. 19, 121-122.)

Because of a series of evidentiary rulings, some of which form the basis of this petition, petitioner was deprived of the ability to present the bulk of his evidence and to conduct effective cross-examination. In contrast, the prosecution was allowed to present a massive quantity of out-of-court statements only a small portion of which involved or made reference to petitioner, interlaced with Agosto's testimony, subject to cross-examination only at periodic intervals after his credibility had been repeatedly "reinforced."[2]

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[2] See RT Vol. V at 100-101, 122-126; Vol. III at 85-86. See also, e.g., RT Vol. V at 16-24, (Continued)

Defendant Tamburello was acquitted of all charges. The remaining defendants, including petitioner were each convicted of one count of conspiracy and several substantive counts.

REASONS FOR GRANTING THE WRIT

I.

IN AFFIRMING THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S SEVERANCE MOTION ON THE GROUND THAT HIS CO-DEFENDANT'S TESTIMONY WOULD HAVE BEEN SUBJECT TO SUBSTANTIAL IMPEACHMENT, THE COURT OF APPEALS APPLIED AN INTERNALLY-INCONSISTENT RULE NOT FOLLOWED BY A MAJORITY OF THE CIRCUITS.

Petitioner contended before trial and on appeal that his trial should have been severed from that of his co-defendants in order to permit one of his co-defendants, Carl Civella, to testify in his behalf. (Slip opn. A-33.) Counsel for Carl Civella confirmed in camera that Carl would testify for petitioner if the

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94-96, 131-132; Vo. VIII, at 91-136; Vol. IX, at 28-32, 54-60, 103-106; Vol. X, at 2-10, 24-28; Vol. XII, at 31-70, 88-126.

trials were severed. (Slip opn., A 33-34.) Carl himself declared under oath that, at a severed trial, he would testify that he was unaware of any involvement by petitioner in the Tropicana scheme; that he had told petitioner that he had a group of potential investors for a deal involving a casino of the Tropicana's size; that he had asked petitioner to evaluate the Tropicana's worth, investigate other casinos and consult concerning the possibility of a deal; and that his inquiries to petitioner dealt solely with the viability of such a transaction. (RT Vol. 1 at 6.)

Such testimony undeniably would have been exculpatory in that it would have supplied a plausible, lawful explanation for petitioner's presence at various meetings at which the "skimming" scheme was allegedly discussed. What would have remained would have been silence in the

face of evidence of a continuing unlawful scheme, and one only actions believed, the testimony would have limited petitioner's guilt to silent knowledge of the scheme by government witnesses as conspiratorial this testimony would have supported petitioner's contention that he arrived at the November, 1978 meeting in Kansas City expecting to discuss possible investments in the Tropicana and only boasted about his prior "experience" with skimming when it became apparent that the "investors" were interested in such expertise, the testimony most definitely would have been exculpatory. Moreover, in that the government charged that Carl Civella was the "number-two" man in the scheme, second only to his older brother Nick, the testimony would have been significant.[2]

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[2] Nick Civella had offered to testify to the same facts at any severed trial. (See Affidavit of E. Margolin filed March 3, 1983: RT, Feb. 24, 1983, at 11-20.) Unfortunately, Nick (Continued)

The court of appeals agreed with petitioner that "real prejudice" mandating severance under Rule 14 of the Federal Rules of Criminal Procedure is established where "'the defendant shows that [1] the co-defendant is likely to testify at a separate trial and [2] the testimony would exculpate him.' United States v. Starr, 584 F.2d 235, 239 (8th Cir. 1978), cert. denied, 439 U.S. 1115 (1979)." (Slip opn., A-33.) Moreover, the court found that the statement of Carl Civella's counsel was sufficient to satisfy the first prong of the test, and that, to satisfy the second prong, petitioner was required to show only that the testimony would have been "substantially exculpatory" rather than "completely exculpatory" as the district court had required. (Slip opn., A-33.)

However, the court of appeals then concluded that the district court's error

was harmless because, "[e]ven assuming that the proffered testimony, if credited, would have supported Thomas' defense theory, . . . the proferred testimony would have been subject to substantial damaging impeachment". (Slip opn., A-34.) In so concluding, the court relied on the test adopted by the Second Circuit in United States v. Finkelstein, 526 F.2d 517, 524 (2d Cir. 1975), cert denied, 425 U.S. 960 (1976). Petitioner could find no case in which the Eighth Circuit had previously applied that test. (Cf., e.g., United States v. Starr, supra, 584 F.2d at 239; and United States v. Reed, 733 F.2d 492, 508 (8th Cir. 1984). The test has not been accepted by the Fifth, Sixth, Seventh, Ninth and Eleventh Circuits.[3]

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[3] See, United States v. Khan, 728 F.2d 676, 679 (5th Cir. 1984); United States. Whitley, 734 F.2d 1129, 1139 (6th Cir. 1984); United States v. Oxford, 735 F.2d 276, 280-281 (7th Cir. 1984): ("principal question [is] whether the defendant has shown that the codefendant's exculpatory (Continued)

Admittedly, several circuits in addition to the Second have expressly applied the "no substantial impeachment" criterion in weighing the necessity of severance. (United States v. Drougas, 748 F.2d 8, 19 (1st Cir. 1984); United States v. Provenzano, 688 F.2d 194, 199 (3rd Cir. 1982); United States v. Parodi, 703 F.2d 768 (4th Cir. 1983); United States v. McConnell, 749 F.2d 1441, 1444-1445 (10th Cir. 1984). However, at least one of those circuits, the Tenth, after surveying the factors considered by the various circuits, observed that "an analysis of the cases from several circuits discloses some incongruity with respect to the considerations deemed necessary to the evaluation

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testimony would have been available but for the denial of severance"); United States v. Seifert, 648 F.2d 557, 563-564 (9th Cir. 1981)(refusal to grant severance was reversible error); United States v. Little, 753 F.2d 1420, 1446 (9th Cir. 1984); United States v. Johnson, 713 F.2d 633, 640-2 (11th Cir. 1983), cert. denied, ___ U.S. __, 104 S.Ct. 1447 (1984).

of such a motion." United States v. McConnell, supra, at 1445.

Petitioner submits that the "incongruity" is in fact an internal inconsistency. The reason is two-fold. First, any "substantially exculpatory" testimony that is not subject to "substantial impeachment" must logically raise a reasonable doubt as to guilt and so be "completely exculpatory" (the standard expressly rejected by the 8th Circuit). Second, testimony of a co-conspirator that is "substantially exculpatory" is also, almost ineluctably, going to be subject to substantial impeachment. To be significant, the testimony, in all but the rarest cases, would have to come from one of the conspiracy's central figures. Otherwise it would be subject to trivialization on the ground that the declarant had not been in a position to know about the defendant's involvement. But, the testimony of

a conspiracy "kingpin" practically always is subject to impeachment by a bad reputation or criminal record.

The "no substantial impeachment" criterion places the defendant seeking exoneration in an even more frustrating, Catch-22-like bind when the government has tape-recorded conversations involving only defendants and then immunizes just one of them so that, in exchange for leniency, that one can "explain" the context of the conversations, including, as here, the imputation of conspiratorial meanings to words he claims to be code words. If the defendant then requests severance to allow a second co-defendant to testify and provide an alternative explanation of the tape-recorded conversations, the "no substantial impeachment" standard may be invoked to defeat the motion.

If the tapes realistically could only be understood to comport with the one

meaning suggested by the immunized defendant, if only one interpretation is rationally possible, why is the co-defendant immunized in the first place? If, on the other hand, his testimony in fact is needed to make sense of the tapes, might not a second interpretation, even though directly contradicted by the tapes and his immunized testimony, raise some doubt as to the defendant's involvement?

For these reasons, petitioner urges that severance of his trial was compelled by principles of parity between prosecutorial and defense resources, as well as by his right to present exculpatory testimony. In Wardius v. Oregon, 412 U.S. 470 (1973), this Court recognized that the due process clause "does speak to the balance of forces between the accused and his accuser." Id. at 474. While that decision concerned discovery rights, its implications for evidence presentation are

clear: reciprocity of discovery rights is meaningless unless accompanied by a corollary right to reciprocal procedures for the presentation of evidence. See 412 U.S. at 474, n. 6. When the prosecution invokes a procedure such as the conferring of immunity in order to obtain a co-defendant's inculpatory explanation of tape-recorded conversations, and a second co-defendant is willing to give contrary, plausible and exculpating testimony at a severed trial, does not due process entitle him to a severance or any other procedure that would effectively guarantee some measure of parity of opportunity to present evidence?

Because the method of "documenting" charges of conspiracies used in the instant case is becoming ever more prevalent, petitioner respectfully urges the Court to accept his petition, resolve the noted "incongruity" and articulate an

internally-consistent test that better accommodates the right of defendants to offer exculpatory evidence in their defense.

II.

FAILURE TO GRANT SEVERANCE WAS PREJUDICIAL ERROR IN LIGHT OF UNCONTROVERTED EVIDENCE THAT PETITIONER WOULD RISK HIS LIFE WERE HE TO TESTIFY AT A JOINT TRIAL BUT THAT HE WOULD TESTIFY IF HIS TRIAL WERE SEVERED.

Petitioner also sought severance on the ground that he desired to testify in his own defense, but that he could not do so at a joint trial because his testimony would inculpate his co-defendants[4] and, accordingly, testifying would place his life in danger.

The court of appeals conceded the legitimacy of petitioner's fears. (Slip opn. p. 42.) Yet, it concluded that the

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[4] As disclosed by petitioner's counsel in camera, petitioner would have testified that he knew that the Civellas and Agosto were running a "skimming" operation, but that his only business dealings with them involved appraising the value of the Tropicana casino and other comparably-sized casinos for the purpose of advising potential investors.

district court had not abused its discretion in refusing to sever based on rank speculation of the prosecuting attorney that "the risk to [petitioner's] life was believed to be relatively constant whether he decided to testify in his own defense in the joint trial or in a separate trial." (Slip opn, p. 42, emphasis added.) While petitioner is quick to acknowledge that a bare assertion of fear of retaliation should not suffice to compel severance, he urges that a representation by a prosecuting attorney unsupported by any evidence or even first-hand knowledge, similarly should not be permitted to defeat the claim.

Petitioner respectfully submits that even on the basis of the few facts reflected in the court of appeals opinion -- namely, the legitimacy of petitioner's fear for his safety; petitioner's uncontroverted assertion that he would testify

at a severed trial but not at a joint trial; and a plainly speculative statement of a government attorney that he "believed" that petitioner would be exposed to a "relatively" constant risk regardless of when he testified, impliedly conceding that petitioner might be somewhat safer testifying at a severed trial -- petitioner's request for protection for his testimony required more careful consideration by both the district and appellate courts. The court of appeals opinion as it now reads raises the dangerous inference that district courts may dismiss the legitimate fears of defendants who wish to testify in their own defense upon the speculative assurances of prosecuting attorneys, without being obliged even to seriously weigh the competing interests.[5]

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[5] As disturbing as is the courts' and prosecutor's lack of solicitude reflected in the opinion itself, that attitude becomes even more chilling in light of statements in the record that (Continued)

Petitioner is well aware that a defendant who seeks a severance based only on antagonistic defenses carries a heavy burden. See, e.g., United States v. McPartlin, 595 F.2d 1321, 1333-34 (7th Cir. 1976), cert. denied, 444 U.S. 833 (1979); United States v. Ehrlichmann, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977). Petitioner submits, however, that a defendant's interests in testifying in his own defense and in being protected if he does so, and

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reveal the extent of the prosecutor's and courts' awareness of the threat to petitioner. Agosto, petitioner's co-defendant turned informant, intimated at trial several times that he feared for his life as a result of his testimony from the same people that petitioner would fear if he testified. (See, e.g., RT Vol. VI, at 113; Vol. VII, at 95-98.) That fear adds a sinister edge to the court of appeal's report that "Agosto, now deceased, was the government's principal witness against the other defendants." (Slip opn. p. 4.) The similarity of petitioner's situation to that of the recently murdered Chicago businessman, Allen Dorfman, was acknowledged by both the government and the district court. (RT Vol. 1, at pp. 14, 16-17.) A government attorney expressly stated to the trial court that "Carl Thomas's life is in some danger." (RT Vol. I, at pp. 16-17.)

the public's interest in having determinations of guilt be based on all probative, non-prejudicial evidence (see, e.g., Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982)) are weighty interests that must be taken into consideration.

Moreover, severance is not likely to prove a costly remedy. First, severance self-evidently would be less costly in the vast majority of cases than placing a defendant in a witness protection program (see, e.g., 18 U.S.C. § 3521 (1982)) and/or granting partial immunity, options that would be available to witnesses who offered to testify for the prosecution.[6]

Second, severance requests on the ground of fear would likely be made only

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[6] Petitioner notes that as of 1982, some 3,515 endangered prosecution witnesses had been afforded the services of the Witness Protection Program. Rhodes, "Witnesses to Organized Crime and Corruption," in Organized Crime (New York, 1984), p. 182.

occasionally and only by defendants with minimal criminal involvement: a defendant with a substantial criminal record would probably not risk testifying in light of the likelihood of effective impeachment by his own record; a defendant with substantial involvement in the conspiracy would likely conclude that testifying would not improve his case; and a defendant who generally "knew too much" would probably not risk testifying knowing that cross-examination could force disclosures that would subject him to threats from persons beyond his co-defendants.

It is well established that a defendant will not be permitted to benefit, nor the prosecution to suffer, from the defendant's wrongdoing. Thus, for instance, prosecution hearsay testimony will not be excluded where the declarant's unavailability is the result of the defendant's threats. E.g., Reynolds v.

United States, 98 U.S. 145, 159 (1878)); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, sub nom Hofstad v. United States, 431 U.S. 914 (1977); Steele v. Taylor, 684, F.2d 1193 (6th Cir. 1982) The question petitioner herein raises is whether a defendant may be penalized due to threats of his co-defendants? Just as measures, where available, will be taken to mitigate the adverse impact of a defendant's misconduct on the prosecution's case, so too, petitioner submits, should a defendant be entitled to remedial measures, if effective and not too costly, due to co-defendant misconduct. Petitioner submits that denial of his severance motion for this reason again violated his due process right to parity with the prosecution of opportunity to present evidence.

The problem of defendants being threatened into silence is certainly not

new; equally certainly, it is a problem that will not disappear. Petitioner respectfully urges the Court to take this opportunity to articulate guidelines for determining the circumstances under which defendants should be afforded procedural protections, such as severance, to safeguard their lives while they exercise their right to testify in their own defense.

III.

PETITIONER WAS PREJUDICED BY THE DISTRICT COURT'S ERRONEOUS DETERMINATION AT THE CLOSE OF THE PROSECUTION'S CASE THAT HEARSAY STATEMENTS BY HIS ALLEGED CO-CONSPIRATORS WERE ADMISSIBLE.

At trial, the prosecution sought the admission of "several cryptic writings containing code names, telephone numbers, and references to disbursements of moneys" written by codefendants DeLuna and Tamburello. (Slip opn., A-13.) The government urged that the writings were admissible because they came within the

co-conspirator statement exception to the hearsay rules, set forth in Rule 801(d)(2)(E) of the Federal Rules of Evidence. Over defense objection, the trial court ruled at the close of the government's evidence that the government had established by a preponderance of the evidence: (1) that a conspiracy existed; (2) that petitioner, DeLuna and Tamburello all were members of the conspiracy; and (3) that the writings were made during the course and in furtherance of the conspiracy. (Slip opn., A-13.)

The court of appeals upheld that ruling, finding that it had been reached in compliance with the requirements of United States v. Bell, 573 F.2d 1040 (8th Cir. 1980). However, the guidelines propounded by the Eighth Circuit in Bell clearly direct that "the court will make an explicit determination for the record regarding the admissibility of the [chal-

lenged] statement . . . at the conclusion of all the evidence." (Id. at 1044, emphasis added.) That timing requirement is compelled by the "preponderance of the evidence" standard of Rule 801(d)(2)(E). A ruling at the close of the prosecution's case may suffice to effectuate a prima facie or "substantial independent evidence" standard, but not the "preponderance of the evidence" standard here required. Id. See also, United States v. Howard, 706 F.2d 267, 269 (8th Cir. 1983). A growing number of circuits have adopted requirements similar to those articulated in Bell. E.g., United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980), cert. denied, ___ U.S. ___ (1980), 101 S.Ct. 365; United States v. Perez, 702 F.2d 33, 35 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980), cert. denied, 449 U.S. 956; United States v.

Jackson, 627 F.2d 1198 (D.C. Cir. 1980).

A minority of circuits persist in affording trial courts broad discretion in deciding when to rule on the admissibility of co-conspirator statements. United States v. Vinson, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074; United States v. Jefferson, 714 F.2d 689, 696-7 (7th Cir. 1983).

Petitioner respectfully submits that the instant case presents an appropriate record for resolution of this discrepency among the circuits in that petitioner was substantially prejudiced by the erroneous timing of the admissibility ruling. Rare is the case in which an alleged coconspirator whose hearsay statements were admitted is then acquitted of the conspiracy altogether; yet, in the instant case, Tamburello was acquitted not only of the conspiracy charges but the substantive charges as well. It is

impossible to determine whether reasonable doubt was raised by the defense evidence or by the weakness of the prosecution case. In either event, petitioner submits that significant defense evidence was introduced disassociating Tamburello from the conspiracy, and accordingly that it is reasonably likely that the district court would have reached a different conclusion regarding Tamburello's involvement in the conspiracy and the admissibility of his notes had it properly conducted the hearing at the close of all the evidence.

Petitioner was prejudiced by admission of those notes because Agosto "interpreted" them as evidence of petitioner's presence at meetings when the skimming scheme was discussed. Without the notes Agosto's testimony would have been the only evidence in support of claims of petitioner's presence at some of the more incriminating meetings.

CONCLUSION

Petitioner's case represents a particularly egregious example of a growing trend in conspiracy prosecutions, especially notable where organized crime figures are believed to be implicated. Here, the government was permitted to collect an enormous volume of surreptiously recorded conversations and out-of-court statements, immunize one defendant (who turned out to be a central figure in the conspiracy), and then present the out-of-court statements interlaced with the informants "explanations", subject to cross-examination only at periodic intervals after his credibility had been repeatedly reinforced. This method of presentation of evidence seriously undermined petitioner's abiliity to effectively confront the witnesses and

test the evidence against him. Moreover, denial of petitioner's motion for severance deprived him of the ability to present his most exculpatory evidence.

Petitioner respectfully submits that the district court's denial of his requests for severance and exclusion of out-of-court statements not properly shown to have been made in furtherance of the conspiracy each independently interfered with his ability to obtain a fair trial. Taken together, and in light of the rulings granting the prosecution broad leeway in its presentation of evidence, petitioner submits that his due process rights were wholly eviscerated.

For all of the above reasons and because petitioner believes that the issues raised herein are significant and are likely to recur with increasing frequency, petitioner respectfully requests that his petition for writ of

certiorari be granted.

Dated: September 10, 1985

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

Appeals from the United States District Court for the Western District of Missouri

No. 83-2408

United States of America,
Appellee,

v.

Carl Angelo DeLuna,
Appellant.

No. 83-2409

United States of America,
Appellee,

v.

Carl James Civella,
Appellant.

No. 83-2410

United States of America,
Appellee,

v.

Charles David Moretina,
Appellant.

No. 83-2411

United States of America,
Appellee,

v.

Carl Wesley Thomas,
Appellant.

No. 83-2462

United States of America,
Appellee,

vs.

Anthony Chiavola, Sr.,
Appellant.

No. 84-1047

United States of America,
Appellee,

vs.

Carl James Civella,
Appellant.

Submitted: September 10, 1984
Filed: May 10, 1985

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Carl Wesley Thomas, Carl Angelo DeLuna, Carl James Civella, Charles David Moretina, and Anthony Chiavola, Sr., appeal from a final judgment entered in the District Court[1] for the Western District of Missouri upon a jury verdict finding them guilty of knowingly transporting stolen money in interstate commerce, travelling in and utilizing the facilities of interstate commerce with the intention of establishing and managing an unlawful interest in a Nevada gaming establishment, and conspiring with others to accomplish these ends in violation of 18 U.S.C. §§ 2, 371, 1952, 2314 (1982). For reversal appellants argue that the district court erred in (1) refusing to grant their motions for judgment of acquittal (Travel Act violations), (2) upholding the

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[1] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Eastern and Western Districts of Missouri.

validity of a search warrant issued by an allegedly partial magistrate, (3) admitting co-conspirators' written statements, (4) admitting evidence in violation of appellants' confrontation rights, (5) permitting government witness Agosto to testify in separate installments, (6) excluding expert testimony, (7) admitting evidence of other crimes and bad acts, (8) giving a Pinkerton instruction to the jury, (9) refusing to grant their motions for dismissal of the conspiracy count on the grounds of prejudicial variance between the indictment and the government's proof, (10) denying their motions for severance, (11) refusing to dismiss on the grounds of statutory and constitutional speedy trial violations, and (12) refusing to grant their motions for acquittal because of insufficient evidence. Not all appellants join in each allegation of error. For the reasons discussed below, we affirm the judgments of the district court.

On November 5, 1981, eleven defendants were charged in a seventeen-count indictment with conspiracy and substantive offenses in violation of 18 U.S.C. §§ 2, 371, 1952, 2314. Charges against six of the eleven defendants were dismissed or disposed of in proceedings separate from the trial where the five appellants in this case were convicted. Defendant Nick Civella died before trial. Defendants Donald Joe Shepard, Billy Clinton Caldwell and Joseph Vincent Agosto entered guilty pleas before trial. (Agosto, now deceased, was the government's principal witness against the other defendants.) Defendant Carl Caruso participated in the trial for a short time and then entered a guilty plea. Defendant Peter Joseph Tamburello was acquitted.

Appellant Thomas was convicted on one count of conspiracy, six counts of interstate transportation of stolen property, and three counts of violation of the Travel Act. He was sentenced to a total of fifteen years in prison.

Appellant DeLuna was convicted of one count of conspiracy, seven counts of interstate transportation of stolen property, and five counts of violation of the Travel Act. He was sentenced to a total of thirty years in prison and probation for five years following the imprisonment.

Appellant Civella was convicted of one count of conspiracy, six counts of transportation of stolen property, and two counts of violation of the Travel Act. He was sentenced to a total of thirty years in prison.

Appellant Moretina was convicted of one count of conspiracy and three counts of interstate transportation of stolen property. He was sentenced to a total of twenty years in prison and five years probation following the imprisonment.

Appellant Chiavola was convicted of one count of conspiracy and one count of interstate transportation of stolen money. He was sentenced to a total of fifteen years in prison.

All appellants were assessed heavy fines and ordered to pay the costs of the prosecution and to make restitution to the Tropicana Hotel and Country Club.

During the period covered by the indictment (January 1, 1975, to April 1, 1979), the state of Nevada required that persons conducting gaming operations be licensed in accordance with state law and regulations. See Appendix. Any person who owned, managed, or operated a gambling casino, or received directly or indirectly a share of the moneys played therein, had to make his identity known to Nevada gaming authorities and had to be licensed. Key employees, that is, persons who had significant influence over casino management, were required to be licensed. Certain employees, including managers, were required to obtain work permits. Persons who had been convicted of felonies, had poor reputations, or were excluded by law from casinos, and others known to associate with such persons were not likely to be licensed. Donald Shepard and Billy Caldwell were licensed with respect to the Tropicana casino in Las Vegas. Carl Thomas was licensed with respect to his own casinos, Bingo Palace and Slots-of-Fun. None of the other defendants charged in the indictment was licensed or had been issued a work permit.

The government charged and sought to prove that the defendants conspired to gain control over the casino operations at the Tropicana Hotel and Country Club in Las Vegas, Nevada, in order to "skim" money from the casino by removing cash before it was counted or reported and to transport this skimmed money

in interstate commerce. The evidence consisted primarily of the testimony of co-conspirator Joseph Agosto, tape recordings, notes made by DeLuna and other defendants, surveillance testimony by FBI agents, testimony of Tropicana officials, and stipulations. The events described below are based primarily on Agosto's testimony.

Agosto met with Carl DeLuna and Nick and Carl Civella in January 1975 to discuss means by which Agosto could infiltrate and obtain control of the Tropicana so that Agosto could eventually skim money from the casino. DeLuna and the Civellas told Agosto that they would see to it that a Teamsters loan to Tropicana's part-owner Deil Gustafson would be disapproved in order to facilitate Agosto's takeover. The Tropicana at the time was in serious financial trouble. Agosto purchased the Folies Bergere, the successful floor show at the Tropicana, and used this as a base to acquire influence over casino operations.

Agosto, a convicted felon, knew he could never be licensed by the Nevada gaming authorities. The Civellas were in the "Black Book" of persons excluded from Nevada casinos and therefore knew that they could not be licensed. Because Agosto and the Civellas could not be licensed, they agreed to use code names to "camouflage" their true identities and connections with the Tropicana.

Nick Civella instructed Agosto to keep DeLuna informed of his progress in infiltrating the casino. Agosto began to acquire great influence over the daily operations of the hotel and casino. Agosto reported this to DeLuna, who in turn informed the Civellas. Agosto frequently travelled from Las Vegas to Kansas City to meet with DeLuna, Moretina and the Civellas, who occasionally travelled to Las Vegas to discuss Agosto's progress.

At Agosto's request in 1975, Nick Civella was able to rid the Tropicana of competing "hidden" interests. Agosto, DeLuna, and the Civellas then decided to use Carl Thomas to take charge of the skimming at the Tropicana.

Later in 1975, Mitzi Briggs became part-owner of the Tropicana and Agosto's infiltration and exercise of authority ceased temporarily because of Briggs' distrust of Agosto. By 1977, however, Agosto was able to gain Briggs' confidence and by 1978,

Agosto was effectively running the hotel and casino. Briggs never knew that any skimming was taking place.

Upon Carl Thomas' recommendation, Agosto hired Shepard as casino manager. Later Agosto hired Caldwell as assistant casino manager. Shepard and Caldwell were to do the actual skimming under Thomas' supervision.

In March 1978, Agosto and Thomas met or spoke with Nick Civella in Los Angeles and Civella ordered them to start skimming. In April 1978, $11,500 was skimmed by Shepard and transported to Kansas City by DeLuna.

In May 1978, Shepard hired Jay Gould as cashier to skim cash from the cashier's cage of the casino and to falsify fill slips to document the "loss" of cash. Signatures and initials of other casino employees were forged by Caldwell. Caldwell supervised Gould, who passed the skimmed money to Shepard. This money was skimmed before the casino owner or the Nevada gaming authorities knew of its existence.

From June through October 1978, Shepard, Caldwell and Gould skimmed over $40,000 a month and gave it to Agosto. Agosto then gave it to Carl Caruso, who transported the money to Kansas City and delivered it to Moretina. Caruso made at least eighteen trips between Las Vegas and Kansas City. Moretina gave Caruso $1,000 after each delivery. The remaining money was distributed to Joseph Aiuppa and Jack Cerone in Chicago. Anthony Chiavola, Sr., the nephew of the Civellas and a Chicago police officer, aided DeLuna and Nick Civella in the distribution of Aiuppa's and Cerone's shares. Moretina acted as DeLuna's assistant in dealing with Agosto and in receiving the skimmed money from Caruso.

By late September 1978, Agosto and the Civellas were concerned that Shepard or his subordinates might be doing "unauthorized" skimming on their own, thereby reducing their profits. At Agosto's suggestion, a "moratorium" on skimming was ordered by Nick Civella in the months of November and December 1978, so that Carl Thomas could do a study of the Tropicana to determine if unauthorized skimming was occurring. In these same months, Agosto sent $50,000 and $60,000 of his own money to

the Civellas because they still demanded money. Agosto was later reimbursed for $30,000 of this amount by Shepard with skimmed Tropicana money.

On November 26, 1978, Agosto and Thomas flew to Kansas City to meet with the Civellas and DeLuna to discuss lifting the moratorium and more efficient ways of skimming. Skimming resumed in January 1979 and $80,000 in skimmed money was transported to Kansas City on February 14, 1979. Several defendants' homes were searched on that date by FBI agents pursuant to search warrants. The FBI seized $80,000 from Caruso. Notes (referred to during the trial as a "dairy") and other items were seized from DeLuna and Tamburello.

From approximately June 1978 until March 1979, many telephones and meeting places of the defendants were subject to court-authorized electronic surveillance. Immediately following the searches, Agosto, the other defendants, Aiuppa, and Cerone engaged in a series of meetings and telephone conversations to assess the damage done by the searches. Evidence about these meetings and telephone conversations obtained by electronic and visual surveillance and from government witness Agosto was introduced at the trial.

Travel Act Violations

Appellants argue that the district court erred in refusing to grant their motions for judgment of acquittal on the ground that the government failed to prove an essential element of the conspiracy charged in count one of the indictment and of the substantive Travel Act violations, 18 U.S.C. § 1952. Appellants argue that the government failed to prove any criminal violations of Nevada gaming law. We disagree.

Count one of the indictment charged appellants and others with conspiring in violation of 18 U.S.C. § 371 from about January 1, 1975, to about April 1, 1979, to travel in interstate commerce and to use facilities in interstate commerce

> with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: the management,

> operation, conducting, maintaining and carrying on of gaming operations of a licensed gaming establishment in Las Vegas, Nevada, that is, the Tropicana Hotel and Country Club, and the indirect receipt of moneys played therein, by persons who were not licensed or found suitable for licensing by, and whose interests in said gaming establishment had been concealed from, agencies of the State of Nevada, in violation of the Nevada Gaming Control Act, including Sections 463.130, 463.160, 463.165, 463.170, 463.200, 463.335, 463.339, 463.360 and 463.530 of the Nevada Revised Statutes, and regulations of the Nevada Gaming Commission promulgated thereunder, including Regulations 3.080, 3.100, 3.110, 8.010 and 15.1594-6, and to thereafter perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity in violation of Title 18, United States Code, Section 1952.

The indictment also alleged appellants and others conspired to "transport in interstate commerce moneys having a value in excess of $5,000, knowing the same to have been stolen, converted, and taken by fraud, in violation of Title 18, United States Code, Section 2314."

Appellants argue that the government proved only that an unlicensed show producer had assumed de facto control of some operations of the Tropicana Hotel through which he ultimately brought employees into the hotel to steal casino revenues. Appellants argue that theft is a crime in Nevada but not under the Nevada gaming laws. Appellants also argue that the operation or control of a gambling game without a license is not a criminal offense under Nevada law and that such conduct in violation of Nevada gaming regulations only cannot support a Travel Act violation.

Similar arguments involving the Nevada gaming laws and federal prosecution for violations of the Travel Act were rejected by the Sixth Circuit in a comprehensive opinion in *United States v. Goldfarb*, 643 F.2d 422, 426-32 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981). The Travel Act, 18 U.S.C. § 1952, prohibits travel in interstate commerce or the use of facilities of interstate

commerce to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," which is further defined as "any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed." "[I]t is the violation of federal law which is the gravamen of a Travel Act offense." *United States v. Goldfarb,* 643 F.2d at 426 (citations omitted). As noted in *United States v. Goldfarb,* 643 F.2d at 426, which involved conduct similar to that alleged in the present case, "[i]t is abundantly clear that as a predicate to a Travel Act conviction, absent a distinct violation of a law of the United States, the defendants must have engaged in some form of unlawful activity prohibited by the law of the State of Nevada."

We agree with the Sixth Circuit that "a violation of a Nevada Gaming Commission regulation could [not in and of itself] form the predicate state law violation required for a federal prosecution under the Travel Act." *Id.* at 429; *cf. United States v. Gordon,* 464 F.2d 357 (9th Cir. 1972) (violation of nonpenal regulations of state gaming commission insufficient for engaging in "illegal gambling business" in violation of 18 U.S.C. § 1855). However, according to the government's indictment and the district court's instructions, the unlawful activity under the Travel Act in the present case was not based upon violation of state regulations alone but also upon violation of the related Nevada *statutes. See United States v. Goldfarb,* 643 F.2d at 430.

Appellants also argue that the unlawful activity with which they are accused is not a crime under Nevada state law. The government argues that appellants violated Nevada state law by conducting gambling operations without the necessary licenses, Nev. Rev. Stat. § 463.160(1)(a), and by indirectly receiving gambling moneys without the necessary licenses, *id.* § 463.160(1)(c). Although there is no specific penalty for violation of these provisions, the "catch-all" section, *id.* § 463.360, which makes such a violation a gross misdemeanor, and thus a crime, would apply. *See United States v. Goldfarb,* 643 F.2d at 431; *United States v. Polizzi,* 500 F.2d 856, 873 & n.17 (9th Cir. 1974) ("Once a violation of a state criminal statute has been proved it is irrelevant whether that violation is classified as a

felony or misdemeanor."), *cert. denied,* 419 U.S. 1120 (1975). The cited Nevada statutes are set forth in an appendix.

Validity of Search Warrant

Appellants argue that the search of the DeLuna residence authorized by the magistrate was invalid because the magistrate was not a neutral and detached judicial officer who could objectively assess whether probable cause existed. Specifically, appellants argue that the magistrate, while an Assistant United States Attorney from 1961 to 1971, received extrajudicial information about the Civellas and their associates. Appellants argue that during this ten-year period, Carl DeLuna and the Civellas were the subject of an investigation which included electronic surveillance. Further, appellants argue that, during the period the magistrate served as an Assistant United States Attorney, the magistrate (1) was privy to investigative reports which suggested that Carl DeLuna was engaged in anti-social behavior, (2) participated in and supervised the writing and presentation to the court of applications for search warrants relating to Carl DeLuna, (3) presented evidence before the Grand Jury, and (4) prosecuted appellant Carl Civella. Lastly, appellants argue that the magistrate had a long-standing working relationship with the affiant, FBI Agent Ousley, which added to the appearance of impropriety.

Every magistrate, judge and justice must "disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." *Hale v. Firestone Tire & Rubber Co.,* No. 83-2406, 83-2407, slip op. at 8-9 (8th Cir. Mar. 13, 1985); *see Hall v. SBA,* 695 F.2d 175, 178 (5th Cir. 1983); 28 U.S.C. § 455(a). Disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. *In re United States,* 666 F.2d 690, 695 (1st Cir. 1981); *United States v. Poludniak,* 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied,* 455 U.S. 940 (1982).

A magistrate or judge must also disqualify himself or herself if "he [or she] has served in governmental employment and in such capacity participated as counsel . . . concerning the proceeding."

28 U.S.C. § 455(b)(3). If an indictment or investigation leading directly to the indictment began after a former prosecutor took office as a judge, he or she is not considered to have been "of counsel" and is not required by § 455 to disqualify himself or herself. *Barry v. United States,* 528 F.2d 1094, 1098-99 (7th Cir.), *cert. denied,* 429 U.S. 826 (1976).

We hold that the magistrate was not required by § 455 to disqualify himself. The magistrate was not government counsel in this case. Appellants do not argue that the investigation which led to the present prosecution was related to the investigation and prosecution handled by the magistrate when he was an Assistant United States Attorney or that the magistrate was still in the United States Attorney's office when the present investigation began. Neither are there facts alleged which would cause a reasonable person, knowledgeable of all the facts, to believe that the magistrate was unable to impartially assess the existence of probable cause. Knowledge of and from prior investigation does not necessarily require recusal.

Appellants next argue that the search warrant was a "general warrant" and was invalid because it did not state with specificity the items to be seized. We do not agree.

> Where the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice because less particularity can be reasonably expected than for goods (such as those stolen) whose exact identity is already known at the time of issuance.

United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976) (citations omitted). *See also Andresen v. Maryland,* 427 U.S. 463, 475-82 (1976). This lack of specificity is often encountered and has been expressly approved. *United States v. Coppage,* 635 F.2d 683, 687 (8th Cir. 1980); *United States v. Williams,* 633 F.2d 742, 745 n.5 (8th Cir. 1980); *United States v. Dennis.* 625 F.2d 782, 792 (8th Cir. 1980); *In re Search Warrant Dated July 4, 1977,* 572 F.2d 321, 328 n.4 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 925 (1978). The pertinent part of the warrant in the present case authorized seizure of certain generic classes of items and "other means of transferring, distributing and concealing casino

proceeds" in violation of the named statutes. The description of the items to be seized by generic classes was reasonably specific under the circumstances of the present case.

The government argues that appellants Civella, Moretina, and Chiavola lacked standing to object to the validity of the search warrant and the seizure of items pursuant to the search warrant. We need not decide this issue because DeLuna had standing to challenge the search of his house.

Admissibility of Writings Seized from Co-conspirators

Thomas argues that the notes or writings seized pursuant to a search warrant from the homes of DeLuna and Tamburello were improperly admitted under the co-conspirator statement exception to the hearsay rules. Thomas argues that the independent evidence presented by the government was insufficient to prove that the statements were made "in furtherance of" the charged conspiracy.

A statement, including a writing, is not hearsay under Fed. R. Evid. 801(d)(2)(E) if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." In *United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978), this court stated that before an out-of-court declaration of a co-conspirator may be admitted against a defendant, the government must prove that (1) a conspiracy existed, (2) the defendant and the declarant were members of the conspiracy, and (3) the statements were made during the course and in furtherance of the conspiracy. The district court determines the admissibility of the co-conspirator's statement under Fed. R. Evid. 801(d)(2)(E) and must be satisfied that "it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and the defendant were parties." *DeMier v. United States,* 616 F.2d 366, 371 (8th Cir. 1980), *citing United States v. Bell,* 573 F.2d at 1044. In order to be made in furtherance of the conspiracy, a statement "must somehow advance the objectives of the conspiracy, not merely inform the listener [or reader] of the declarant's activities." *United States v. Snider,* 720 F.2d 985, 992 (8th Cir. 1983) (citations omitted), *cert. denied,* 104 S. Ct. 1613 (1984).

In the present case the district court conditionally admitted several cryptic writings containing code names, telephone numbers, and references to disbursements of moneys. At the close of the government's evidence, the district court made an explicit finding in the record, as required by *United States v. Bell,* that the government proved by independent evidence that the proffered writings were more likely than not made during the course and in furtherance of a conspiracy of which Thomas and other appellants were members.

In *United States v. Singer,* 732 F.2d 631, 636 (8th Cir. 1984) (citations omitted), this court, in discussing the admissibility of the co-conspirator's statements, stated that although "the evidence must be independent, *i.e.* exclusive of the challenged statements, . . . it may be circumstantial . . . . The district court's determination will not be reversed unless [it is] clearly erroneous." Therefore, we must decide whether the district court's conclusion that the challenged co-conspirator's statements were made in furtherance of the conspiracy was clearly erroneous.

Agosto testified at length concerning Thomas' involvement in the casino skimming conspiracy. Agosto explained that the handwritten cryptic notes referred to activities between DeLuna and Carl Thomas, such as meetings, telephone conversations, and disbursements of funds made in connection with the skimming operations. The district court concluded that the notes were part of the records made on the skimming operation and held that these records were made in furtherance of the conspiracy. *See, e.g., United States v. Shursen,* 649 F.2d 1250, 1256 (8th Cir. 1981) *(Shursen)*. In *Shursen,* we held that ledgers containing cryptic notes of wagering transactions relating to a gambling operation were made in furtherance of the conspiracy because such records were necessary to a gambling operation. *Id.* at 1256. We hold that the district court's conclusion was not clearly erroneous.

Thomas also argues that some of the notes referring to disbursements of moneys have legitimate explanations, *i.e.,* that the notes indicated repayments on loans and therefore were inadmissible because they were not made during the course and in furtherance of the charged conspiracy. However, after careful

examination of the voluminous record before this court, we hold that the district court's finding that these notes were made during the course and in furtherance of a conspiracy to which Thomas belonged is not clearly erroneous.

Confrontation Rights

Appellants argue that even if properly admitted as co-conspirators' statements pursuant to Fed. R. Evid. 801(d)(2)(E), the admission of notes seized from the homes of DeLuna and Tamburello and certain tape recordings violated their rights under the confrontation clause of the sixth amendment. The circuits are divided as to whether a co-conspirator statement that is admissible under Fed. R. Evid. 801(d)(2)(E) necessarily satisfies the requirements imposed by the confrontation clause. This circuit, following the Supreme Court decision in *Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980), has held that even if a co-conspirator statement is admissible under Fed. R. Evid. 801(d)(2)(E), in order to satisfy the requirements of the confrontation clause, the government must demonstrate that the declarant is unavailable and that the statement bears sufficient indicia of reliability. *See United States v. Massa,* 740 F.2d 629, 638-39 (8th Cir. 1984). *Accord United States v. Ammar,* 714 F.2d 238, 254-57 (3d Cir.), *cert. denied,* 104 S. Ct. 344 (1983); *United States v. Perez,* 658, F.2d 654, 660-61 & n.5 (9th Cir. 1981); *United States v. Wright,* 588 F.2d 31, 37-38 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979). Several circuits have adopted "a per se rule permitting the use of properly admissible extrajudicial statements of a co-conspirator who does not take the stand at trial without risk of reversal for violation of his co-defendants' rights to confrontation." *United States v. Papia,* 560 F.2d 827, 836 n.3 (7th Cir. 1977); *accord United States v. Lurz,* 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied,* 455 U.S. 1005 (1982); *United States v. McManus,* 560 F.2d 747, 750 (6th Cir. 1977), *cert. denied,* 434 U.S. 1047 (1978); *Ottomano v. United States,* 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied,* 409 U.S. 1128 (1973).

The declarants who were also co-defendants in the present case are considered "unavailable" for the purposes of the confrontation clause because they exercised their fifth amendment right and chose not to testify at their trial. We only need to consider,

therefore, the "indicia of reliability" of the statements made by the co-defendants. *See United States v. Ammar,* 714 F.2d at 255.

As noted above, this court has already rejected the government's argument that the co-conspirator's exception is a "firmly rooted hearsay exception" and that reliability can be presumed under *Ohio v. Roberts. See United States v. Massa,* 740 F.2d at 639. *See also United States v. Ammar,* 714 F.2d at 255.[2] This court, however, has stated that although "the confrontation clause and the hearsay exceptions are not co-extensive, . . . evidence properly admitted under the co-conspirator exception does not, absent unusual circumstances, violate the confrontation clause." *United States v. Panas,* 738 F.2d 278, 283-84 (8th Cir. 1984) (citations omitted). *See also United States v. Bentley,* 706 F.2d 1498, 1507 n.7 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 2397 (1984); *United States v. Kiefer,* 694 F.2d 1109, 1113 (8th Cir. 1982); *United States v. Singer,* 660 F.2d 1295, 1307 (8th Cir. 1981), *cert. denied,* 454 U.S. 1156 (1982); *United States v. Nelson,* 603 F.2d 42, 46 (8th Cir. 1979). *Accord United States v. Ammar,* 714 F.2d at 256. The following factors are relevant to the reliability inquiry under the confrontation clause: (1) whether the context of the statements and the persons to whom they were made suggest that the statements are reliable, (2) whether the declarant had a motive for lying, (3) whether the declarant had difficulty with his or her memory, and (4) whether the declarant had personal knowledge of the identity and role of the participants in the crime. *See United States v. Massa,* 740 F.2d at 639; *United States v. Kiefer,* 694 F.2d at 1113. It is not necessary that all four factors be present in order to satisfy the confrontation clause. *United States v. Ammar,* 714 F.2d at 256.

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[2] As noted by this court in *United States v. Massa,* 740 F.2d 629, 639 (8th Cir. 1984), *citing United States v. Ammar,* 714 F.2d 238, 255 (3d Cir.), *cert. denied,* 104 S. Ct. 344 (1983),

> [t]he Federal Rules of Evidence categorize co-conspirator statements along with admissions as "[s]tatements which are not hearsay." Fed. R. Evid. 801(d)(2). Admissions are not admitted because of confidence in their inherent reliability; rather, they are admitted because a party will not be heard to object that [she or he] is unworthy of credence.

After careful review of the record we are convinced that the out-of-court statements by DeLuna and Tamburello contain sufficient "indicia of reliability." Certainly DeLuna and Tamburello had personal knowledge of the identity and the roles of the conspiracy members. The statements were not made under circumstances that suggest an incentive for prevarication.[3] Finally, the statements were corroborated by independent evidence. *Id.* at 256-57.

Although we caution district courts to carefully monitor the admission of co-conspirator statements in complex conspiracy trials such as the one in the present case, we hold that the co-conspirator's statements did not violate the confrontation clause.

Agosto's Testimony

Thomas argues that the district court abused its discretion under Fed. R. Evid. 611(a) in permitting the government to present Agosto's testimony in such a way that Thomas argues restricted defense counsel's ability to effectively cross-examine Agosto. The government argues that the orderly presentation of evidence approved by the district court aided the jury's understanding of a complex case and at the same time protected all appellants' confrontation rights. The government argues, therefore, that the district court did not abuse its discretion in approving the presentation of Agosto's testimony. We agree.

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[3] In *United States v. Ammar,* 714 F.2d at 257 n.16, the court noted that

> [v]irtually all of the statements . . . admitted under Rule 801(d)(2)(E) were made to other members of the conspiracy. In view of the importance of maintaining trust between conspirators, and the possibility that whatever was said by one might be relied upon by the others, the conspirators would have understood that a falsehood could have destroyed the enterprise in which they were jointly engaged. Moreover, many of the statements were made under circumstances which indicate spontaneity, decreasing the likelihood of deliberate falsehood.

The statements in the present case were made under similar circumstances.

During the government's case-in-chief, Agosto took the stand on three separate occasions (June 8-10, June 14-16, and June 20-21). During each Agosto "installment," the government introduced as evidence many tape-recorded conversations and handwritten notes concerning the conspiracy, and Agosto testified about this evidence immediately after its presentation. Upon completion of each installment, defense counsel was permitted to thoroughly cross-examine Agosto, using the notes and tape recordings presented on direct, as well as the transcripts of the tape recordings to aid the cross-exanination.[4] Defense counsel, however, wished to cross-examine Agosto immediately after his commentary upon each of the 106 tape recordings, not following each installment. To demonstrate the necessity of such frequent cross-examination, defense counsel presented to the district court an affidavit by a psychologist attesting to the adverse psychological impact upon the jury of the procedure requested by the government.

The district court was unpersuaded by the psychologist's affidavit. Relying on *United States v. Jackson*, 549 F.2d 517 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977), and Fed. R. Evid. 611(a), the district court allowed the government to present Agosto's testimony in installments, permitting cross-examination of Agosto by defense counsel only at the completion of each installment. To protect appellants' rights of confrontation, the district court instructed the government to interrogate Agosto as any other witness, that Agosto would not be permitted to testify in a narrative fashion. The district court also warned the government that each installment of Agosto's testimony must relate to a new subject, to a new sequence of events. The district court stated that Agosto could not clarify previous testimony in subsequent installments. Thomas argues that despite these safeguards the manner

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[4] Each installment of Agosto's testimony was followed by supplemental testimony of witnesses providing background and foundational evidence. Corroborating Agosto's testimony, FBI agents testified about their surveillance of the skimming operations. Thomas does not dispute that each corroborative witness was subjected to thorough cross-examination by defense counsel immediately following his or her testimony.

in which Agosto's testimony was presented rendered Agosto effectively impervious to cross-examination.

In this circuit the manner and order of interrogation and presentation of evidence are matters committed to the discretion of the district court. *See United States v. Jackson,* 549 F.2d at 528. The method of presenting Agosto's testimony permitted by the district court in the present case provided Thomas ample opportunity to thoroughly cross-examine Agosto regarding his testimony. The district court concluded that with the proper safeguards the orderly presentation requested by the government did not diminish Thomas' or other appellants' right to effective cross-examination. We hold that the district court did not abuse its discretion in permitting the government to present Agosto's testimony in installments.

Expert Testimony

Thomas and Civella argue that the district court abused its discretion in excluding the testimony of a linguistics expert that Thomas and Civella argue was vital to their theory of defense. Thomas and Civella sought to introduce the testimony of an expert in the field of applied linguistics to testify concerning the results of a "discourse analysis" the expert performed on the Marlo tape. Discourse analysis focuses on the structure of a conversation in order to determine which speakers have "conversational power" or the ability to control the conversation. Appellants hoped to demonstrate that their participation in the Marlo tape conversation focused on their legitimate financial interests and the other participants emphasized the illegal activities.

Fed. R. Evid. 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise." The district court has broad discretion in deciding whether to admit expert testimony. *See Holmgren v. Massey-Ferguson, Inc.,* 516 F.2d 856, 858 (8th Cir. 1975). In *United States v. Schmidt,* 711 F.2d 595, 598-99 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 705 (1984) (*Schmidt*), the court upheld the district court's decision to exclude the testimony of a linguistics

expert. In *Schmidt,* the defense, through expert testimony, sought to explain how certain statements, that on their face might be construed to be false, might be viewed differently when considered in the context of the entire discussion. The Fifth Circuit concluded, however, that the district court was in the best position to determine whether the proffered expert testimony would assist or confuse the jury and held that the district court did not abuse its discretion in refusing to admit the expert testimony. *Id.*

In the present case the district court considered the arguments of counsel on this issue and, outside the presence of the jury, permitted the expert to explain the nature of his proposed testimony. The district court excluded the proffered expert testimony on the ground that it would confuse the jurors rather than assist them to understand the evidence or to determine a fact in issue. We hold that the district court did not abuse its discretion in excluding the proffered expert testimony.

Evidence of "Other Crimes" and "Bad Acts"

Appellants argue that the district court erred in admitting evidence of "other crimes" and acts tending to show bad character because the evidence was irrelevant or its probative value was outweighed by its prejudicial impact and therefore should have been excluded under Fed. R. Evid. 404(b).

Fed. R. Evid. 404(b) states that evidence of "other crimes, wrongs, or acts" is not admissible to prove character, but is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) is one of inclusion rather than exclusion and "admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition." *United States v. Wagoner,* 713 F.2d 1371, 1375 (8th Cir. 1983). Evidence of prior wrongful acts is admissible if (1) the evidence is relevant to an issue other than the defendant's character, (2) there is clear and convincing evidence that the defendant committed the other acts, and (3) the potential unfair prejudice does not outweigh its probative value. *Id., citing United States v. Evans,* 697 F.2d 240, 247-48 (8th Cir.), *cert. denied,* 460 U.S. 1086 (1983).

Evidence which is probative of the crime charged, and not solely uncharged crimes, is not "other crimes" evidence. *United States v. Bagaric*, 706 F.2d 42, 68 (2d Cir.), *cert. denied*, 104 S. Ct. 134 (1983); *United States v. Black*, 692 F.2d 314, 316 (4th Cir. 1982). Further, where the evidence of an act and the evidence of the crime charged are inextricably intertwined, the act is not extrinsic and Rule 404(b) is not implicated. *United States v. Caspers*, 736 F.2d 1246 (8th Cir. 1984); *United States v. Derring*, 592 F.2d 1003, 1007 (8th Cir. 1979).

The trial court has broad discretion under this rule, *United States v. Evans*, 697 F.2d at 248, and will be reversed only when the evidence "clearly has no bearing upon any of the issues involved." *United States v. Wagoner*, 713 F.2d at 1375. In balancing the prejudicial effect and probative value, great deference is given to the district judge's determination, *United States v. Boykin*, 679 F.2d 1240, 1244 (8th Cir. 1982), and express findings are not required. *United States v. Koessel*, 706 F.2d 271, 275 n.4 (8th Cir. 1983); *United States v. Evans*, 697 F.2d at 248-49. We examine appellants' objections to the admission of evidence of "other crimes" and wrongful acts in light of these general principles.

Tropicana and El Dorado Merger

The government presented evidence that Agosto and Tropicana executives hoped to merge with another public corporation, the El Dorado Corporation, which sold recreational vehicles. The goal of the merger was to pump new life into the Tropicana, which had suffered many financial setbacks. Agosto testified that he had "insider information" that the stock was to be offered to the public and feared the Securities and Exchange Commission might launch an investigation of him, the Tropicana, and the merger if Agosto and his associates made large profits on the stock venture.

The government argues that the evidence about the proposed merger did not constitute evidence of other crimes or wrongful acts. The government further argues that the evidence was relevant to its case because it showed Agosto's control of the Tropicana, DeLuna's supervision of Agosto, and DeLuna and the

Civellas' intent to exercise control over the Tropicana and their involvement in the management decisions of the Tropicana.

We hold that the district court did not abuse its discretion in admitting evidence of the proposed merger. The evidence was offered to prove that appellants had a hidden interest in the Tropicana and exercised control over decisions concerning the Tropicana. This evidence, therefore, is probative of the crime charged and is not evidence of other crimes or wrongful acts. *United States v. Black*, 692 F.2d at 316.

Chicago Conspiracy (Argent Corporation)

The Argent Corporation, which owned four casinos, was allegedly the focus of a conspiracy to skim money from casinos and to transport the money in interstate commerce. This conspiracy is the subject of another indictment (*United States v. DeLuna*, No. 83-124-01-CRW8 (W.D. Mo.); *United States v. DeLuna*, No. 84-2285, 84-2286, 84-2287 (8th Cir. Apr. 11, 1985) (interlocutory appeal from order denying motion to dismiss indictment)); there is a partial overlap in time and membership in the Chicago conspiracy and the conspiracy charged in this case.

The government presented evidence that the Tropicana, although financially unsound, was able to secure loans from several other casinos, several of which belonged to the Argent Corporation. Agosto testified that the Tropicana was able to secure the loans because of the Civellas' influence.

Appellants argue that the Chicago conspiracy is distinct from the charged conspiracy in participants, aims, and conduct. Appellants therefore argue that references to control by Chicago, the Argent Corporation, and Agosto's efforts to acquire the LIDO show at the Stardust (owned by the Argent Corporation) were part of a second conspiracy, and the unfair prejudice to appellants from the evidence outweighed any slight probative value.

The government argues that the references to the Argent Corporation and persons associated with Chicago did not constitute evidence of "other crimes" because the loans and the influence exercised to get them were not alleged or shown to be illegal. The government also argues that the evidence was relevant

to show Agosto's control over the Tropicana and to establish that Civella directed Agosto to certain places to obtain loans and used his influence to insure that the loans were made. The government argues that other evidence concerning Chicago (Agosto's testimony that skimmed money was going to Chicago and that a meeting was to be held in Chicago in October 1978, certain notes of DeLuna that document the transfer of Tropicana funds to persons in Chicago) is evidence of the charged conspiracy and not other crimes evidence.

We agree that this evidence is not "other crimes" evidence. The district court did not abuse its discretion in admitting this evidence which was probative of issues in the case.

Rosenthal Gaming Activities

Frank Rosenthal, a non-licensed sports entertainer at the Stardust casino, was involved in an alleged conspiracy which involved accusations by Rosenthal against the governor of Nevada and which was reported in Las Vegas newspapers as an attempt to intimidate the governor during his election campaign.

The government introduced testimony of Agosto, newpaper articles about the Rosenthal accusations which were seized from DeLuna's and Carl Civella's homes, and recorded conversations concerning the activities of Rosenthal. Agosto testified that he feared that his status as a non-licensed entertainer (as producer of the floor show) at the Tropicana would be jeopardized, if Rosenthal, who occupied a similar position at the Stardust, continued his controversial activities and was subsequently investigrated because of these activities. Recorded conversations of appellants discussing this concern were also admitted into evidence.

The government argues that the evidence was offered to establish the interest and involvement of DeLuna and the Civellas in the gaming industry in Las Vegas and their interest in maintaining their de facto control of the Tropicana through Agosto.

We hold that the district court did not abuse its discretion in admitting this evidence. The evidence concerning Rosenthal was not "other crimes" evidence because Rosenthal was not a defendant, the government did not allege and the evidence did not

indicate that appellants were involved with Rosenthal or that appellants committed any crimes or wrongful acts. Further, the district court instructed the jury that "these matters . . . do not necessarily in any respect relate to anything illegal. And they are submitted solely for the purpose of showing the contact between the parties with respect to these articles and an interest in them by . . . parties."

"Bakers" Conspiracy

The government presented evidence that a group of individuals from New Jersey identified as the "Bakers" held an undisclosed hidden interest in the Tropicana prior to Agosto's gaining control. The Bakers reasserted an interest in the Tropicana in 1978. Agosto testified that he met with Nick Civella in a light projection room of the Tropicana to discuss this interest. Following instructions from Chicago and the Civellas, Agosto paid the Bakers $375,000 of his own money in order to buy out this interest. Agosto testified that this was in keeping with the agreements with the Civellas that the Civellas would eliminate the Bakers as rivals to Agosto's control of the Tropicana and would protect Agosto from other people who might attempt to assert interests at the Tropicana.

The government argues that the evidence does not indicate criminal activity by any appellant. The government further argues that the evidence is highly probative of the conspiracy charged, that is, that appellants had a hidden interest in the Tropicana and exercised management and control over the Tropicana. We agree with the government's position and hold that the district court did not abuse its discretion in admitting the evidence.

Misconduct of Carl Thomas

The government was permitted to present recorded conversations of Carl Thomas (Marlo tape, Ex. 199), wherein he stated that he had been involved in skimming at many casinos in Las Vegas for many years. This conversation occurred during a meeting wherein appellants discussed various methods of skimming and Thomas related his experience with skimming and recommended ways of skimming.

Appellants argue that the evidence was highly prejudicial and should have been excluded under Fed. R. Evid. 404(b). The government argues that the evidence was not other crimes evidence because the references were inextricably intertwined in the offense charged and because the evidence established Thomas' role in the conspiracy. Alternately, the government argues that the evidence is admissible under Fed. R. Evid. 404 as proof of intent.

We hold that the evidence was admissible. "The rule limiting admissibility of uncharged misconduct does not shield an accused from the reception of evidence that he boasted of his past experience in crime in order to reassure a prospective vender or co-worker of his skill and reliability." *United States v. Stoles,* 12 M.J. 229, 10 Mil. L. Rep. (Pub. L. Educ. Inst.) 2185, 2190 (C.M.A. 1982). Moreover, Thomas' statements, to the extent they prove bad character and Rule 404(b) is implicated, are admissible to prove Thomas' intent to engage in the charged conspiracy because Thomas had consistently taken the position that he had no intent to join a conspiracy.

List of Excluded Persons (Black Book)

The government was permitted to introduce evidence that Carl and Nick Civella appeared in the List of Excluded Persons (commonly referred to as the Black Book). The Black Book is a list of prople who must be excluded from Nevada casinos by a gaming licensee. The Black Book is issued by the State Gaming Control Board and adopted and promulgated by the Nevada Gaming Commission. A gaming licensee is subject to disciplinary action if the licensee fails to evict a person listed in the Black Book. A government witness testified that persons listed in the book could not be licensed.

Appellants argue that the names of Carl and Nick Civella were entered in the Black Book when there were no regulations concerning who was to be included and the Covellas were given no notification or opportunity to defend against inclusion. Appellants argue that this evidence, strongly suggesting bad character, was prejudicial and should have been excluded.

The government argues that the evidence was offered to show that the Civellas, because they were in the book, could not be licensed. Alternately, the government argues that the evidence would be admissible, even if considered "other crimes" evidence, because it established the motives of appellants. The government further argues that this evidence was necessary because appellants refused to stipulate that they were "unlicensable." We hold that the district court did not abuse its discretion in admitting this evidence.

Prison Records of Civella and Quinn Testimony

The government was permitted to present the testimony of James Patrick Quinn (Nick Civella's attorney of many years), prison visitation records and other evidence which indicated that Nick Civella had been in prison and had been involved in a number of prior criminal proceedings. Appellants argue that this evidence had no purpose other than to show that Nick Civella had a propensity to commit crimes and to raise an inference of guilt by association as to the other defendants.

The government argues that the evidence was admitted as necessary background or to establish the identity of the persons referred to by code names in DeLuna's notes and the recorded conversations. The principal method of establishing the identity of these persons was a comparison of prison records reflecting visitors of Nick Civella with DeLuna's notes of the same date. Other evidence (*e.g.*, prison hospital records, telephone records) was also used in conjunction with DeLuna's notes to establish the identities of persons referred tyo by code names, meeting places, participants in meetings, and recipients of "skimmed" money. The government argues that Quinn's testimony was offered to establish that DeLuna, Tamburello, and the Civellas used Quinn's office for the purposes of the conspiracy.

We hold that the district court did not abuse its discretion in admitting the prison visitation records of Nick Civella. The evidence was not other crimes evidence because the government introduced the evidence to prove the crime charged—that appellants, referred to by code names, were involved in the conspiracy and committed certain substantive offenses as part of the conspir-

acy. The identification of appellants' code names was critical to the government's case. DeLuna's notes and the tape recorded conversations corroborate Agosto's testimony only if the code names and appellants could be matched. Even if we consider the prison records as other crimes evidence, it would still be admissible to establish identity under Rule 404(b) and the probative value of the evidence outweighs the prejudice resulting from the evidence of a prior conviction.

The district court did not abuse its discretion in admitting Quinn's testimony concerning appellants' use of Quinn's office for personal use (meetings, phone calls, receipt of mail). The evidence was not other crimes evidence because there was no allegation that this conduct was wrong or criminal. Quinn in response to several questions did testify that he had represented Nick Civella in a number of criminal proceedings and his answers indirectly indicated that Civella had been convicted. The district court, however, sustained Chiavola's objection to further questions concerning convictions of Nick Civella.

Appellants also argue that Dr. Skinner's testimony concerning Civella's status as a prisoner and the security surrounding Civella while at the UCLA Medical Center—guards and chains—was erroneously admitted. We agree that this is evidence of "other crimes" and does not come within any of the exceptions of Rule 404(b). We hold, however, that this evidence was harmless because evidence of Civella's prison record was properly admitted as part of the government's evidence concerning the identity of the code names. Consequently the erroneous admission of Dr. Skinner's testimony concerning Civella's status as a prisoner could have had no effect on the outcome of the trial.

Defense Counsel Conduct

Appellants argue that they suffered irreparable damage and prejudice as a result of Agosto's testimony concerning alleged acts of impropriety by DeLuna's defense attorney. Appellants argue that Agosto was "vituperative" and "hurled personal barbs" at the defense attorney. Agosto during cross-examination by defense counsel charged that a former partner of the defense attorney, who had represented Agosto prior to this trial, had requested

Agosto to lie under oath during a hearing before the Nevada Gaming Control Board.

The government argues that this evidence was not other crimes evidence because the evidence did not concern any crimes or misconduct by appellants. The government further argues that the wrongdoing also was not attributed to DeLuna's defense attorney, but rather to a former partner of the defense attorney who did not represent any of the defendants at trial.

We hold that the district court did not err in denying a severance or a mistrial based on the brief exchanges between Agosto and DeLuna's defense attorney. The evidence was not other crimes evidence and therefore Rule 404(b) is not implicated.

Evidence of Post-Conspiracy Meetings

Appellants argue that the district court erred in admitting testimony of surveillance agents of a meeting on March 11, 1979, of Carl Civella, DeLuna, Chiavola, Aiuppa, and Cerone at the Chicago residence of Anthony Chiavola. Appellants argue that the charged conspiracy ended on February 14, 1979 (the date appellants' homes were searched) and the meeting was evidence of another conspiracy. The government argues that the meeting occurred during the period encompassed by the charged conspiracy. Further, the indictment alleged that the conspiracy continued until on or about April 1, 1979, the district court held that the evidence of the March 11, 1979, meeting was reasonably probative of the conspiracy charged because "it is a gathering in the context of months and weeks of a close association, [from] which . . . the jury could reasonably infer the conspiracy to commit wrongful acts." We agree with the district court's analysis and hold that the district court did not abuse its discretion in admitting the evidence.

Appellants also argue that the district court erred in admitting a recorded conversation between the Civellas and Chiavola on November 30, 1979, at the United States Prison at Leavenworth (Ex. 237b) because the recorded statements were not made in furtherance of the charged conspiracy, which ended at least nine months before. The government argues that the tape recorded

conversation was not offered as a co-conspirator statement but was offered only against Carl Civella and Chiavola to prove their consciousness of guilt because during the November 1979 conversation they discussed the two meetings held at Chiavola's house and other acts in furtherance of the conspiracy. The district court did not abuse its discretion in admitting the recorded conversation of November 30, 1979. Although the conversation was not made during the course and in furtherance of the charged conspiracy, the statements were admissible as admissions of a party-opponent. Fed. R. Evid. 801(d)(2)(A); *e.g., United States v. Kenny,* 645 F.2d 1323, 1339-40 (9th Cir.), *cert. denied,* 452 U.S. 920 (1981); *United States v. Porter,* 544 F.2d 936, 939 (8th Cir. 1976). The district court instructed the jury that the statements could only be considered against Chiavola and Civella.

We have carefully considered the remaining evidentiary issues raised by appellants and find them to be without merit.

Pinkerton Instruction

Appellants next argue that the district court erred in giving the jury Instruction No. 68, a "Pinkerton" instruction.[5] *See Pinkerton*

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[5] Instruction No. 68 instructed the jury as follows:

> If you find that a particular defendant is guilty of conspiracy as charged in Count One, you may also find that defendant guilty of an offense or offenses as charged in any one or more of Counts Two through Fifteen of the indictment in which he is charged, provided that you find that the essential elements of that Count as defined in these instructions have been established beyond a reasonable doubt, and provided that you also find beyond a reasonable doubt,
>
> First, that the offense or offenses defined in the non-conspiracy Counts Two through Fifteen was or were committed pursuant to or in the scope of the conspiracy, and
>
> Second, that the particular defendant was a member of the conspiracy at the time that the offense or offenses charged in Counts Two through Fifteen was or were committed.
>
> Under the conditions just defined a defendant who is found guilty of conspiracy may also be found guilty of the offense charged in another count or counts even though he did not participate in the acts constituting the offense as defined in the other count or counts.

v. United States, 328 U.S. 640, 645-48 (1946). Appellants argue that a Pinkerton instruction unconstitutionally creates a mandatory presumption which shifts the burden of persuasion of every element of the offenses charged from the government to the defendant. *See, e.g., Sandstrom v. Montana,* 442 U.S. 510, 523-24 (1979); *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

Appellents' argument is without merit. The district court did not err in giving a Pinkerton instruction to the jury. *E.g., United States v. Redwine,* 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied,* 104 S. Ct. 2661 (1984); *United States v. Richmond,* 700 F.2d 1183, 1191 (8th Cir. 1983). The instruction challenged in the present case correctly reflected the substance of the holding in the *Pinkerton* case that a defendant found guilty of a conspiracy may also be found guilty of substantive offenses committed by a co-conspirator or co-conspirators, in furtherance of the conspiracy, at the time that defendant was a member of the conspiracy, even though that defendant did not participate in the substantive offenses or have any knowledge of them. 328 U.S. at 645-48. The challenged instruction did not create any unconstitutional presumptions and did not modify the government's burden to prove every element of the offenses charged beyond a reasonable doubt.

Variance

Appellants argue that reversal of their convictions is required because there was a variance between the indictment and the evidence which resulted in an amendment of the indictment and which affected their "substantial rights." Specifically, appellants argue that the evidence showed that multiple conspiracies existed although the indictment alleged only one conspiracy. Appellants further argue that the admission of irrelevant and inflammatory evidence concerning these other conspiracies confused the jury and resulted in substantial prejudice to them. Lastly, appellants argue that the district court erred in failing to give a cautionary instruction.

The reason for this is that a co-conspirator committing an offense pursuant to a conspiracy is held to be the agent of other conspirators.

The government argues that the evidence did not establish multiple conspiracies. The government further argues that any evidence of other conspiracies was admissible to prove the charged conspiracy.[6]

> Variance refers to the failure of the government's proofs to conform to the indictment. A variance is not fatal to the prosecution unless the defendant could not reasonably have anticipated from the indictment what evidence would be presented at trial or unless the indictment is so vague as not to bar subsequent prosecution on the same offense.

United States v. Goldfarb, 643 F.2d at 433 (citing district court order denying post trial motions). To resolve the question of whether the government's proof showed that one or multiple conspiracies existed, we must determine "whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy." *United States v. Jackson,* 696 F.2d 578, 582 (8th Cir. 1982) (citations omitted), *cert. denied,* 460 U.S. 1073 (1983). The existence of a single agreement can be inferred if the evidence revealed that the alleged participants shared "a common aim or purpose" and "mutual dependence and assistance" existed. *Id.* at 582-83, *citing United States v. Bertolotti,* 529 F.2d 149, 154 (2d Cir. 1975); *see Hayes v. United States,* 329 F.2d 209, 213-14 (ith Cir.), *cert. denied,* 377 U.S. 980 (1964).

We hold that there was no variance between the indictment and the evidence. The government offered the testimony of Agosto, various tape recorded conversations (notably the Marlo tape of November 26, 1978), and DeLuna's notes to establish that appellants (and other defendants) had a common aid or purpose—the skimming of money from the Tropicana and transportation of this money to persons in other states who had a hidden interest in the Tropicana. The evidence also showed "dependence and assistance" among the co-conspirators. Agosto needed the Civellas' assistance to gain control of the Tropicana,

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[6] Appellants cite as error admission of evidence of these conspiracies on other grounds. These alleged errors are discussed in other parts of this opinion.

keep out other hidden interests at the Tropicana, and maintain his cash flow at the Tropicana. The Civellas needed Agosto as their agent at the Tropicana to convey information to them, implement decisions and oversee the skimming operation. DeLuna and Moretina were needed to distribute the money to the co-conspirators. Chiavola was involved in distributing money to two individuals (Aiuppa and Cerone) in Chicago and in providing a meeting place and security for the co-conspirators. Thomas, Caldwell and Shepard, under the direction of the other co-conspirators, did the actual skimming at the Tropicana.

Severance

Appellants next argue that the district court abused its discretion in denying their motions for severance. All appellants argue that they were prejudiced by the "spillover effect" of the incriminating evidence presented at the joint trial. Appellants also note that government witness Agosto repeatedly made sarcastic and prejudicial references to lead defense counsel and counsel's professional relationship with other persons who had been charged with similar unlawful conduct. Thomas also argues that he was prejudiced because his co-defendants had reputations as notorious gangsters and because government witness Agosto made several statements which referred to his co-defendants' reputations for violence and revenge and Agosto's fear for his life because of his cooperation with the government.

Thomas argues individually that he was also prejudiced because his co-defendant Carl Civella would have testified in Thomas' favor in a separate trial and because his defense was so inconsistent with and antagonistic to that of his co-defendants.

For the reasons discussed below, we hold that the district court did not abuse its discretion in refusing to grant appellants' motions for severance.

As a preliminary matter we reject appellants' general allegation of misjoinder. There is a strong policy in favor of joint trial where the defendants are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). However, severance of charges or defendants properly joined is

governed by Fed. R. Crim. P. 14. As noted in *United States v. Jackson,* 549 F.2d at 523 (citations omitted).

> [i]t is the general rule that persons charged in a conspiracy should be tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts. Severance will be allowed upon a showing of real prejudice to an individual defendant. However, the motion to sever is addressed to the discretion of the trial court, and a denial of severance is not grounds for reversal unless clear prejudice and an abuse of discretion are shown.

Thus, "[a]n abuse of discretion in refusing severance is not alone enough to justify reversal and a new trial. There must also be prejudice. That is, there must be some appreciable chance that [the] defendants would not have been convicted had the separate trial they wanted been granted." *United States v. Bostic,* 713 F.2d 401, 403 (8th Cir. 1983).

We find no abuse of discretion in the district court's refusal to grant appellants' motions for severance on the grounds of any "spillover effect." The poor reputation of one's co-defendant or co-defendants alone is not grounds for severance from joint trial. *See, e.g., United States v. Knowles,* 572 F.2d 267, 270 (10th Cir. 1978). Moreover, appellants have not carried the "heavy burden" of showing real prejudice. *See, e.g., United States v. Graham,* 548 F.2d 1302, 1311 (8th Cir. 1977). In the context of an allegation that incriminating evidence presented in a joint trial has "spilled over" from one or more defendants to another, we must consider whether the jurors were able to follow the trial court's cautionary instructions and compartmentalize the evidence against each defendant on each count individually. In the present case the jury verdicts strongly indicate that the jury followed the cautionary instructions given by the district court, compartmentalized the evidence and was not confused by the evidence because the jury acquitted one defendant and found appellants guilty of some charges but acquitted on other charges. *See, e.g., United States v. Zicree,* 605 F.2d 1381, 1389 (5th Cir. 1979) (citing *Tillman v. United States,* 406 F.2d 930, 935-36 (5th Cir.), *vacated in part on other grounds,* 395 U.S. 830 (1969)), *cert. denied,* 445 U.S. 966 (1980); *United States v. Boyd,* 595 F.2d 120, 125 (3d Cir. 1978).

Thomas argues individually that the district court abused its discretion in denying his motion for severance and that he has shown real prejudice because if he had been tried separately, his co-defendant Carl Civella would have exculpated him.

"[I]t is not reversible error to deny severance requested on the ground that a defendant wants to call a co-defendant as a witness, unless the defendant shows that the co-defendant is likely to testify at a separate trial and the testimony would exculpate him [or her]." *United States v. Starr,* 584 F.2d 235, 239 (8th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979). Here, counsel for Carl Civella stated *in camera* that Carl Civella had affirmatively represented that he would testify on behalf of Thomas if the trials were severed. That is a sufficient showing that the co-defendant that Thomas wanted to call as a witness would have been likely to testify at a separate trial. "It was not necessary for [Thomas] to prove to a certainty that [Carl Civella] would be available and willing to testify in a separate trial" *Id.*

With respect to the second requirement, Thomas argues that the district court improperly required him to show that the co-defendant's testimony would have been "completely exculpatory." The term "completely exculpatory" would seem to require the defendant to show that the co-defendant's testimonoy would conclusively establish the defendant's innocence. We agree that such a requirement would be too demanding. However, in view of the strong policies favoring joint trials where permissible, the defendant must show that the co-defendant's testimony would be sustantially exculpatory. The defendant must show that the co-defendant's testimony would do more than "merely tend to contradict a few details of the government's case against [him or her]." *United States v. Garcia,* 647 F.2d 794, 796 (8th Cir.) (citing *United States v. Abraham,* 541 F.2d 1234, 1240 (7th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977)), *cert. denied,* 454 U.S. 970 (1981).

We believe, however, that the improper use of a "completely exculpatory" standard was harmless error under the circumstances. We can discern the substance and exculpatory effect of the desired testimony from the record. During the *in camera* proceeding counsel for Carl Civella stated that Carl Civella's

testimony would have contradicted that of Agosto and supported Thomas' defense that Thomas was involved in legitimate investigations of casino finances and Thomas' characterization of the conversations on the Marlo Tape. Even assuming that the proffered testimony, if credited, would have supported Thomas' defense theory, we note, however, that the proffered testimony would have been subject to substantial damaging impeachment, particularly from the Marlo Tape itself and other government evidence. *See United States v. Finkelstein,* 526 F.2d 517, 524 (2d Cir. 1975), *cert. denied,* 425 U.S. 960 (1976). We have carefully reviewed the record and are convinced that, although the question is a close one, the district court did not abuse its discretion in refusing to grant Thomas' motion for severance on the ground that he wanted to call a co-defendant as a witness.

Thomas also argues that because his defense theory was so inconsistent with and antagonistic to those of his co-defendants, he was unable to testify in his own defense in a joint trial and the district court abused its discretion in refusing to grant his motion for severance on this ground. According to a proffer made *in camera* by Thomas' counsel, Thomas' testimony would have incriminated his co-defendants and as a result his life would have been endangered had he testified.

> While there are situations in which inconsistent defenses may support a motion for severance, the doctrine is a limited one. . . . [T]he governing standard requires the moving defendant to show that "the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."

United States v. Haldeman, 181 U.S. App. D.C. 245, 559 F.2d 31, 71 (1976) (banc) (citation omitted), *cert. denied,* 431 U.S. 933 (1977). We hold that the district court did not abuse its discretion in refusing to grant Thomas' motion for severance on the ground of inconsistent and antagonistic defenses. The conflict between Thomas' defense and those of his co-defendants simply did not reach the level from which the jury would infer from the conflict alone that both Thomas and his co-defendants were guilty. Thomas does not argue that his co-defendants' defenses

would inescapably inculpate him; rather, Thomas' defense was inconsistent and antagonistic with those of his co-defendants only because his defense was that he knew nothing about the skimming but that his co-defendants did. "[T]he mere presence of hostility among defendants or the desire of one to exculpate himself [or herself] by inculpating another have both been held to be insufficient grounds to require separate trials." *United States v. Barber,* 442 F.2d 517, 530 (3d Cir.), *cert. denied,* 404 U.S. 958 (1971). "Thus antagonistic defenses do not require the granting of severance even when one defendant takes the stand and blames his [or her] co-defendant for the crime." *United States v. McPartlin,* 595 F.2d 1321, 1334 (7th Cir.) (citations omitted), *cert. denied,* 444 U.S. 833 (1979).

Thomas also argues that his trial should have been severed because he would have been able to testify in his own defense in a separate trial. Thomas argues that he could not testify in the joint trial and inculpate his co-defendants without fear for his life. While we in no way depreciate Thomas' fears for his personal safety, we find no abuse of discretion in the district court's denial of severance. According to an *in camera* statement of the government, to the use of which thomas does not object, the risk to Thomas' life was believed to be relatively constant whether he decided to testify in his own defense in the joint trial or in a separate trial.

Speedy Trial

Chiavola was indicted in November 1981 and was brought to trial on May 31, 1983, eighteen months after the indictment. The case was originally set for trial on December 28, 1981. In the interim from December 1981 to may 1983, the district court granted a number of motions for continuance filed by Chiavola's co-defendants.

Chiavola argues that the district court's denial of his motions for immediate trial and his motions to dismiss violated his right to a speedy trial, guaranteed by the sixth amendment, the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982), and Fed. R. Crim. P. 48(b). The district court denied the motions for immediate trial and made findings pursuant to § 3161(h)(8))(A).

The sixth amendment guarantess that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case: 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'" *Barker v. Wingo,* 407 U.S. 514, 522 (1972) (citations omitted). The Supreme Court has identified four factors which courts should consider in determining whether a particular defendant has been deprived of this right: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530.

We consider first the reason for the eighteen-month delay between the indictment and trial. The district court continued the case at the request of Chiavola's co-defendants and ordered the parties to submit a monthly status report on their discovery activities. Extensive discovery, which began in November 1981, continued throughout 1982. On December 3, 1982, the district court granted the motion of co-defendant Nick Civella for a continuance from February 7, 1983, to April 11, 1983, in part because of a scheduling conflict of the lead defense counsel on the pretrial motions. On March 10, 1983, the district court again continued the case to May 16, 1983, on the motion of all the defendants except Chiavola in order to accommodate pretrial motions and a "more orderly trial preparation." On May 10, 1983, the case was continued to May 31, 1983, in order to obtain stipulations.

We next consider what prejudice, if any, resulted to Chiavola as a result of the eighteen-month delay. "Prejudice, of course, should be assessed in light of the interests of defendants which the speedy trial right was designed to protect . . . [1] to prevent oppressive pretrial incarceration; [2] to minimize anxiety and concern of the accused; and [3] to limit the possibility that the defense will be impaired." *Id.* at 532. *See United States v. MacDonald,* 456 U.S. 1, 8 (1982). Chiavola argues that he was prejudiced by the "anxiety of waiting 18 months for a trial . . . [and the] constraints on his liberty stemming from bond restric-

tions." Chiavola does not claim that he was hampered in his defense by this delay.

We hold that Chiavola's sixth amendment right to a speedy trial was not violated by the eighteen-month delay. The district court granted the continuances at the request of Chiavola's co-defendants, the continuances were necessary to adequate preparation for trial and reasonable considering the complexity of the case, and Chiavola was not hampered in his defense by the delay. Any prejudice to Chiavola resulting from the denial of his request for a new trial is outweighed by the public interest in bringing this complex case to trial in an orderly fashion.

Chiavola also asserts that the delay violated the Speedy Trial Act. The Act states in relevant part:

> [T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial oficer of the court in which such charge is pending, whichever date last occurs. . . .
>
> * * * *
>
> The following periods of delay shall be excluded in computing the time . . . within which the trial of any such offense must commence:
>
> * * * *
>
> (7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.
>
> (8)(A) Any period of delay resulting from a continuance granted by any judge on his [or her] own motion or at the request of the defendant or his [or her] counsel . . . if the judge granted such continuance on the basis of his [or her] findings that the ends served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(c)(1), (h)(7)-(8)(A). We hold that the district court did not abuse its discretion in denying Chiavola's motion for speedy trial as provided by the Speedy Trial Act. The delay was attributable to the pretrial motions of Chiavola's co-defendants and therefore is excluded by the Speedy Trial Act from computation. *E.g., United States v. Campbell,* 706 F.2d 1138, 1141 (11th Cir. 1983); *United States v. Stafford,* 697 F.2d 1368, 1372 (11th Cir. 1983). There was no deliberate procrastination or negligent inaction on the part of the government. *See, e g., United States v. Lane,* 561 F.2d 1075, 1077-78 (2d Cir. 1977).

Chiavola next argues that the district court abused its discretion in denying the motion to dismiss for want of prosecution under Fed. R. Crim. P. 48(b). This rule imposes a more stringent standard than the sixth amendment, *United States v. DeLeo,* 422 F.2d 487, 495 (1st Cir.), *cert. denied,* 397 U.S. 1037 (1970), and permits dismissal even though there has been no constitutional violation. *E.g., United States v. Carlson,* 697 F.2d 231, 236 (8th Cir. 1983). "Dismissal under this rule is discretionary and is governed by the same general considerations as the Sixth Amendment." *Id., citing United States v. Crow Dog,* 532 F.2d 1182, 1194 (8th Cir. 1976), *cert. denied,* 430 U.S. 929 (1977); *see United States v. Tantalo,* 680 F.2d 903, 909 (2d Cir. 1982). We hold that the district court did not abuse its discretion in denying the motion to dismiss for want of prosecution. The delay was the result of the need of the prosecution and defense to prepare for the trial of very complicated charges. there was no purposeful delay by the government.

Sufficiency of the Evidence

Moretina

Moretina was convicted of conspiracy and three counts of interstate transportation of stolen money in excess of $5,000 or aiding or abetting therein. Moretina argues that there was no evidence of any conduct engaged in by him, which, independent of the co-conspirator testimony, established that he became a member of the conspiracy and knowingly agreed to accomplish the alleged conspiratorial goals. Moretina further argues that there was insufficient nonhearsay evidence connecting him to the

conspiracy so as to render co-conspirator statements admissible against him. Moretina argues that the references to his contact with the other defendants, his presence or the presence of his automobile at certain places establish bare association only. Moretina also argues that it is significant that he was not present at the Marlo meeting attended by a number of the defendants and at which casino skimming techniques were discussed.

"[A]n out-of-court declaration of a co-conspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course and in furtherance of the conspiracy." *United States v. Bell,* 573 F.2d at 1043. The district court must make a preliminary determination that the independent evidence proves by a preponderance that the defendant was involved in a conspiracy and that the out-of-court statement was made during the course and in furtherance of the conspiracy. *Id.* at 1043-44. the proof may be "totally circumstantial," *United States v. Terry,* 702 F.2d 299, 320 (2d Cir.), *cert. denied,* 461 U.S. 931 (1983) (citations omitted), and "the court must view the evidence as a whole rather than consider individual items in isolation." *Id.* (citations omitted).

We hold that the government's independent evidence considered as a whole proved by a preponderance that a conspiracy existed and that Moretina was one of the conspirators. Agosto's testimony, which was corroborated by the Marlo tape, established the existence of a conspiracy. The government introduced the nonhearsay evidence that Moretina was a member of the conspiracy. Agosto testified that DeLuna introduced Moretina to Agosto as his "associate" in 1975, that Moretina was frequently present when DeLuna picked up Agosto at the Kansas City airport and that the three of them would discuss Agosto's progress in infiltrating and obtaining control of the Tropicana and the "skimming operation." Agosto also spoke to Moretina by phone when DeLuna was unavailable and asked Moretina to relay messages concerning the Tropicana to DeLuna. The FBI agents also observed Moretina entering and leaving a Kansas City hotel where the co-conspirators met; observed DeLuna or DeLuna's car

at Moretina's residence; on September 7, 1978, observed Tamburello, Nick Civella, and DeLuna talking together; and on February 9, 1979, observed Moretina driving his car, with DeLuna as a passenger, in the vicinity of Caruso's office, where his car was later seen parked, and observed DeLuna and Moretina later driving away together. Tapes also revealed Moretina and DeLuna discussing possible meetings; some of these tapes were secretive in tone.

In reviewing a denial of a motion for a judgment of acquittal, we must view the evidence in the light most favorable to the government and must give the government the benefit of all reasonable inferences that may logically be drawn from the evidence. *United States v. Smith,* 680 F.2d 255, 259 (1st Cir. 1982), *cert. denied,* 459 U.S. 1110 (1983); *United States v. Anziano,* 606 F.2d 242, 244 (8th Cir. 1979). "A motion for acquittal should be granted only where 'the evidence viewed in the light most favorable to the Government, is such that a reasonably minded jury *must* have a reasonable doubt as to the existence of any of the essential elements of the crime charged.' " *United States v. White,* 562 F.2d 587, 589 (8th Cir. 1977) (per curiam) (citations omitted; emphasis in original).

"Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy." *United States v. Dunn,* 564 F.2d 348, 357 (9th Cir. 1977). A defendant's participation in a conspiracy must be established with proof that the defendant knowingly contributed efforts in furtherance of it. *United States v. Brown,* 584 F.2d 252, 262, (8th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979).

We hold that the evidence was sufficient for a jury to infer that Moretina had a "slight connection" to the conspiracy and transported stolen money in interstate commerce. In addition to the nonhearsay evidence discussed above, the government introduced the following hearsay evidence of Moretina's participation in the conspiracy. Agosto testified that both DeLuna and Caruso told him that Moretina's role was to pick up skim money when Caruso arrived in Kansas City and to deliver it to DeLuna for distribu-

tion. DeLuna also told Agosto to talk to Moretina "about anything without reservation." DeLuna's code name "CP" was shown to be that of Moretina. Additionally, DeLuna's notes reflect that "CP" (Moretina) received $5,000 from moneys delivered on November 8, 1978, by Caruso. Additionally, notes (Exs. 64 and 64b) seized from Carl Civella's residence in tendem show that "Charlie" (Moretina) received "10%" of the "skimmed" money, ranking just below Nick Civella, Carl Civella and Carl DeLuna.

Chiavola

Chiavola was convicted of conspiracy and one count of interstate transporation of stolen property. Chiavola argues that there was no evidence that he participated in the conspiracy, had any knowledge of the skimming activity, participated in the actual movement of $17,500 from Kansas City to Chicago, Illinois, or performed any acts which aided or abetted the transportation of stolen property.

The existence of the conspiracy was established by independent, nonhearsay evidence. Agosto testified that a conspiracy existed between him, Nick Civella, and other defendants. Once the conspiracy was established, co-conspirator statements were admissible against all the defendants. Agosto testified that a portion of the skim money was going to Chicago to some of DeLuna's associates. These transfers of money were documented by DeLuna in coded notes, which contained code names for defendants and other conspirators. Chiavola was called "Stomp" and was referred to in the notes as "Stmp", "Stp", and "Stm." The notes indicate that DeLuna met with "Stmp to work out details to start meeting stmp for papers [money] in the future" and that on September 8, 1978, Nick Civella called ("Stm") and told him to hold ""35" ($35,000) for Aiuppa.

An appellate court reviewing the denial of a motion for a judgment of acquittal must view the evidence in a light most favorable to the government. *United States v. Anziano*, 606 F.2d at 244. "To establish aiding and abetting the government is required to show that the defendant associated himself with the unlawful venture, that he participated in it as something he

wished to bring about, and that he sought by his action to make it succeed." *Id.* at 244-45 (citation omitted). "[S]ome affirmative participation [by the defendant] which at least encourage the perpetrator [must be shown]." *Id.* at 245. We hold that there was sufficient evidence from which the jury could have inferred that Chiavola was a member of the conspirary and transported stolen money in interstate commerce.

Accordingly, the judgments of the district court are affirmed. The government's motion to strike portions of appellant Chiavola's reply Brief is denied.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix B

United States Court of Appeals
for the Eighth Circuit
No. 83-2411WM.
United States of America,
Appellee,
vs.
Carl Wesley Thomas,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Petition for rehearing en banc filed by appellant is denied. Petition for rehearing by the panel is also denied.

July 12, 1985.

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-423 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARL WESLEY THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
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Washington, D.C. 20530
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In the Supreme Court of the United States

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CARL WESLEY THOMAS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court abused its discretion by refusing to grant a severance and that it committed plain error by failing to reconsider its ruling on the admissibility of co-conspirator statements at the close of all of the evidence.

1. Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on six counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314, three counts of interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952, and one count of conspiracy to commit these offenses, in violation of 18 U.S.C. 371. He was sentenced to a total of 15 years' imprisonment, fined

$90,000, and ordered to make restitution of an additional $90,000. The court of appeals affirmed (Pet. App. A1-A43).[1]

The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. A4-A7). Briefly, it showed that petitioner and others conspired to gain control of the Tropicana casino in Las Vegas, Nevada in order to "skim" money by removing cash receipts before they were recorded in the casino's books. Co-conspirator Joseph Agosto met in January 1975 with Nick Civella and petitioner's co-defendants Carl DeLuna and Carl Civella to plan Agosto's clandestine infiltration of the casino. Later that year, these men "decided to use [petitioner] to take charge of the skimming at the Tropicana" (*id.* at A5). Petitioner recommended the hiring of a casino manager who, with an assistant, "were to do the actual skimming under [petitioner's] supervision" (*id.* at A6). By the middle of 1978, over $40,000 per month was being skimmed from the casino. When Agosto and the Civellas suspected that the manager was also skimming on his own account, they instructed petitioner to "do a study of the Tropicana to determine if unauthorized skimming was occurring" (*ibid.*). Later in 1978, petitioner met with Agosto, DeLuna, and the Civellas to discuss more efficient means of skimming (*id.* at A7). In February 1979, $80,000 in skimmed cash was transported from Nevada to Missouri (*ibid.*). Petitioner admitted in a recorded conversation "that he had been involved in skimming at many casinos in Las Vegas for many years" (*id.* at A23).

2. The court of appeals affirmed (Pet. App. A1-A43). Noting that petitioner and his co-defendants were properly joined for trial under Fed. R. Crim. P. 8(b) (*id.* at A31), the

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[1]Petitioner's co-defendants Carl DeLuna, Carl Civella, Charles Moretina, and Anthony Chiavola, Sr., were each convicted on the conspiracy count and various substantive counts. Co-defendant Peter Tamburello was acquitted.

court of appeals held that the district court did not abuse its discretion in refusing to grant petitioner a severance under Fed. R. Crim. P. 14.[2] After "carefully review[ing] the record," the court of appeals rejected petitioner's argument that a severance was required so that he could obtain the testimony of co-defendant Carl Civella, concluding that a severance would have been of little value because Civella's "testimony would have been subject to substantial damaging impeachment" (*id.* at A34). The court similarly rejected petitioner's contention that he was precluded from testifying on his own behalf at the joint trial out of a fear for his safety, noting that the risk have would been substantially the same if he had testified at a separate trial (*id.* at A35). Finally, the court of appeals upheld the admission at trial of statements of petitioner's co-conspirators under Fed. R. Evid. 801(d)(2)(E) on the ground that the district court's finding that the statements were made in furtherance of the conpsiracy was not clearly erroneous (*id.* at A13).

3. Petitioner argues that the district court abused its discretion by refusing to grant him a severance so that he could be tried separately from his four co-defendants.

a. Petitioner contends first (Pet. 8-18) that a severance was required so that he could have the benefit of the testimony of co-defendant Carl Civella, who did not take the stand at the joint trial. The court of appeals in this case applied the same standard consistently set forth by other courts of appeals, upholding the denial of a severance where a co-defendant's testimony would be subject to substantial impeachment. See, *e.g.*, *United States* v. *McConnell*, 749

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[2]Fed. R. Crim. P. 14 provides in pertinent part that "[i]f it appears that a defendant * * * is prejudiced by a joinder of offenses or of defendants * * *, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

F.2d 1441, 1445 (10th Cir. 1984); *United States* v. *Drougas*, 748 F.2d 8, 19 (1st Cir. 1984); *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983); *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982). None of the cases cited by petitioner (Pet. 12-13 n.3) conflicts with this settled rule.[3] The court of appeals' fact-bound conclusion that there was no abuse of discretion in the denial of a severance here in light of the extent to which Carl Civella's testimony would have been subject to impeachment on the basis of a tape recording of petitioner's own statements, written notes, and the testimony of government witnesses (see Pet. App. A13, A17 n.4, A23, A34) does not warrant review by this Court.

b. Petitioner also argues (Pet. 18-25) that a severance was required because he was precluded from testifying at the joint trial out of fear for his safety. This claim is meritless. In support of his contention in the district court, petitioner submitted two affidavits from his attorneys. These were placed under seal, and the government has never had

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[3]Petitioner cites no case in which the denial of a motion to sever was held to be an abuse of discretion where the co-defendant's proffered testimony was subject to substantial impeachment. *United States* v. *Khan*, 728 F.2d 676, 679 (5th Cir. 1984), *United States* v. *Little*, 753 F.2d 1420, 1446 (9th Cir. 1984), and *United States* v. *Johnson*, 713 F.2d 633, 642 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984), all recognized the relevance of the credibility of the proffered testimony in reviewing rulings on motions to sever. *United States* v. *Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984), and *United States* v. *Oxford*, 735 F.2d 276, 280-281 (7th Cir. 1984), upheld denials of severance motions on other bases without discussion of the question presented here. *United States* v. *Seifert*, 648 F.2d 557, 563-564 (9th Cir. 1980), reversed the denial of a severance motion where no question was raised as to the credibility of the co-defendant's testimony. Finally, petitioner quotes (Pet. 13-14) *United States* v. *McConnell*, *supra*, out of context. The court in that case expressly recognized (749 F.2d at 1445) that the likelihood of impeachment has consistently been taken into account by the courts of appeals in reviewing motions to sever on the ground that petitioner asserts.

access to them. At an in camera hearing, we acknowledged that there was some danger to petitioner from persons in Chicago who were not his co-defendants but observed that these persons had no interest in whether petitioner obtained a severance, so that the threat to him would be substantially the same whether he testified at a joint trial or at a separate one (I Tr. 16-18). The district court found after reviewing the sealed affidavits that petitioner's fears were subjective (I Tr. 14). The court of appeals, which also had access to the affidavits, upheld the district court's exercise of discretion (Pet. App. A35). The petition provides no explanation of how a severance could have protected petitioner from any significant threat to his safety arising from the content of testimony he allegedly would give. There is accordingly no reason for further review.

4. Finally, petitioner contends (Pet. 25-29) that the district court erred by failing to reconsider after the close of all of the evidence its ruling, made when the government rested, that certain statements were admissible under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Petitioner has waived this claim by failing to raise it in either the district court or the court of appeals. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, the rule in the Eighth Circuit is precisely the one advanced by petitioner, requiring an ultimate determination of admissibility "at the conclusion of all the evidence." *United States* v. *Bell*, 573 F.2d 1040, 1044 (1978). Finally, the court of appeals, on the basis of its review of the entire record, sustained the district court's factual findings supporting the admission of the statements (Pet. App. A13-A14). The district court's harmless departure from established circuit precedent thus does not warrant this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985